

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

THOMAS DAVID WEATHERS and KATHY  
JEAN WEATHERS,

Defendant.

Case No. CR04-5487FDB

ORDER DENYING DEFENDANT'S  
MOTION FOR NEW TRIAL

Before the Court is the motion of Defendant Thomas Weather for new trial. The Court, having considered the motion, the Government's response, and evidence presented at trial, finds that the motion shall be denied.

I.

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, upon a defendant's motion, the court may grant a new trial if the interest of justice so requires. *United States v. Merriweather*, 777 F.2d 503, 507 (9<sup>th</sup> Cir. 1985). The decision to grant a new trial is within the sound discretion of the trial court, but a new trial is to be granted "only in an exceptional case in which the evidence weighs heavily against the verdict." *Id.* Defendant Weathers' attacks the verdict on several grounds; each is addressed below.

II.

*Defendant's Legal Arguments*

A. Proof that Corporate Entities Were "Nominees" Under State Law

Defendant argues again that the government should not have been allowed to present

1 evidence relating to Defendant's use of corporate entities without first proving that these entities  
2 were "alter egos or nominees" under Washington or some other state's law. This argument was  
3 previously rejected by the Court in pretrial motions and at trial (*See* Order, Dkt. #236). This  
4 argument is again rejected on the same grounds.

5 B. Proof of Requirement to File Particular Tax Form

6 Defendant argues that his conviction for failure to file tax returns is improper because the  
7 government failed to present evidence of a the particular statute or regulation that required  
8 Defendant to file a Form 1040. The Court disagrees. The jury was properly instructed as to the  
9 elements of the charged crime as set forth in the Court's Jury Instruction 17, which required the  
10 government to show that the Defendant received a minimum amount of gross income, and that the  
11 defendant willfully did not file an income tax return by the prescribed date. What qualifies as an  
12 "income tax return" was further defined in the Court's Jury Instruction 22. The evidence at trial  
13 demonstrated that Defendant Thomas Weathers earned gross income in excess of \$1 million per year,  
14 an amount in excess of the minimum thresholds as set forth in Instruction No. 17, and that he failed  
15 to file any form or document that met the definition of an "income tax return" as set forth in  
16 Instruction No. 22.

17 C. Admission Into Evidence of 1996 Amended Return (Form 1040X)

18 Defendant argues that the government cannot "allege" that his 1996 Form 1040X was  
19 frivolous without a prior legal determination pursuant to *Neitzke v. William*, 490 U.S. 319, 32  
20 (1989). That case involved a pro se litigant's civil complaint, which has no application here. As set  
21 forth in the Court's previous orders, IRS administrative protocols and remedies are not relevant to  
22 this criminal proceeding. Defendant also argues that the Amended Return should have been  
23 excluded because of the six year statute of limitation. While the Form 1040X was filed by the  
24 Defendant in July 1998, outside of the limitations period, the false statements of income were  
25 probative of willfulness and also constitute an affirmative act of evasion, which were properly

1 considered by the jury. *See, e.g., United States v. Carlson*, 235 F.3d 466, 470 (9<sup>th</sup> Cir. 2000).

2 D. Production of IRS Manuals

3 The Court ruled on May 13, 2005 (Dkt.#228) that the government need not demonstrate that  
4 the IRS followed certain administrative procedures in order to prove that a tax amount is due and  
5 owing. The Court ruled on June 3, 2005, that the Defendant had failed to show how the IRS  
6 manuals were relevant to the issues at trial. The evidence at trial demonstrated that Defendant  
7 Weathers signed and filed a tax return for 1996, in which he admitted that he owed over \$103,000.00  
8 in tax, but then failed to pay, and then affirmatively evaded payment of that tax. The evidence also  
9 reflected that Defendant Weathers earned in excess of \$1 million per year in gross income, but failed  
10 to file any income tax returns after 1996. Defendant has failed to provide the Court with any  
11 explanation as to how an ability to decode IRS records, which simply records the administrative  
12 actions taken by the IRS for the years in question, would provide information useful in refuting this  
13 evidence or how the absence of these records prejudiced the presentation of his case.

14 E. Evidence of IRS Collection Activity

15 The jury was properly instructed on the elements for the crime of evasion of tax, as set forth  
16 in the Court's Jury Instruction 14. The Court is not aware of any requirement that the government  
17 demonstrate that the IRS undertook collection activity in order to convict Defendant Weathers for  
18 evasion of tax. In any event, the evidence at trial was that the IRS attempted civil collection  
19 proceedings against Defendant Weathers and that liens were filed by the IRS in an attempt to collect  
20 the tax.

21 III.

22 *Defendant's Evidentiary Arguments*

23 A. Identity of Creator of Defendant Exhibit A-2

24 Defendant claims a new trial is warranted because the government failed to identify the  
25 author of a handwritten note contained in discovery material produced to the defense by the

1 government. When defense counsel attempted to admit the document, the Court excluded its  
2 admission because Defendant provided no foundation or context for its introduction and no  
3 explanation for its relevance. Defendant also provides no explanation how disclosure of the author  
4 of the note would have any impact on the ultimate verdict by the jury that Defendant failed to file tax  
5 returns in light of the uncontested evidence at trial that Defendant Weathers earned significantly  
6 more than the minimum required for filing, but had failed to file a tax return since 1996. This  
7 evidence was properly excluded.

8 B. IRS Witnesses and Requirements of the IRS Code

9 Defendant Weathers claims that the government's IRS witnesses contradicted each other  
10 when citing to the IRS Code, one claiming that "income" was defined in the Code, the other stating  
11 that it was not; one claiming that Form 1040 was the prescribed form but that a statement could not  
12 be filed unless the form was unavailable, a claim Defendant claims is contrary to the law. Defendant  
13 appears to be arguing that he can hardly be held accountable to know that he has a duty to pay taxes  
14 when the so-called "experts" cannot seem to agree. This argument is not credible, particularly when  
15 viewed in light of the evidence presented at trial. The evidence at trial demonstrated that Defendant  
16 Weathers filed income tax returns and paid federal income tax for almost thirty years; he signed and  
17 filed a tax return declaring that he owed over \$103,000.00 in taxes for the tax year 1996; his  
18 professional tax preparer told him he owed over \$103,000.00 for the 1996 tax year and that he  
19 should pay it; he received notices from the IRS telling him he owed and should pay the \$103,000.00  
20 for the 1996 tax year.

21 C. Absence of Additional IRS Witnesses

22 Defendant claims that the government intentionally failed to call any witness who worked for  
23 the IRS and had any personal contact with him and that he could not call and compel as witnesses  
24 individuals employed with the IRS. This is factually incorrect. Special Agent Daniel Wardlaw  
25 testified at trial that he had personal contact with Defendant Weathers. Defendant never requested

1 assistance in subpoenaing any witnesses and the assertion that Defendant could not compel any  
2 witnesses has no basis as he never made such a request. Additionally, Defendant Weathers has  
3 provided the Court with no explanation as to how the absence of these unnamed witnesses  
4 prejudiced the presentation of his case.

5 IV.

6 *Juror Impartiality*


7 Defendant contends it was error to retain a juror (W.S.) on the jury. Following W.S.'s  
8 disclosure of a potential predisposition towards the government based on the juror's receipt of  
9 retirement benefits from social security and Navy pension, the Court inquired further regarding the  
10 juror's ability to remain neutral and make his decision based upon the evidence and the law as it was  
11 given to him by the Court. The juror unequivocally assured the Court that he could be impartial and  
12 the Court was satisfied that the juror was competent to remain on the panel. Although given the  
13 opportunity to do so, the Defendant did not challenge the juror's continued presence on the jury at  
14 that time. The Court does not find this a sufficient basis for granting a new trial now.

15 ACCORDINGLY,

16 IT IS ORDERED:

17 (1) Defendant Thomas Weather's Motion for New Trial (Dkt. #295) is **DENIED**.

18  
19 DATED this 28th day of July, 2005.

20   
21 FRANKLIN D. BURGESS  
22 UNITED STATES DISTRICT JUDGE  
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